No. 93-1450

(3)

Supreme Court, U.S.
FILED
JUN 13 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CEDARS-SINAI MEDICAL CENTER,
WARREN S. GRUNDFEST, M.D., JAMES S. FORRESTER, M.D.,
and FRANK LITVAK, M.D.,

Petitioners,

vs.

SECRETARY OF THE
UNITED STATES DEPARTMENT OF ENERGY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RECEIVED
JUN 13 1994
OFFICE OE THE CLERK
SUPREME COURT, U.S.

PETITIONERS' REPLY BRIEF

Of Counsel:
BRUCE G. CHAPMAN

LYON & LYON
611 West Sixth Street
Thirty-Fourth Floor
Los Angeles, California 90017

COE A. BLOOMBERG
Counsel of Record

LYON & LYON
611 West Sixth Street
Thirty-Fourth Floor
Los Angeles, California 90017
(213) 489-1600

Attorneys for Petitioners

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

6 pp

No. 93-1450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CEDARS-SINAI MEDICAL CENTER,
WARREN S. GRUNDFEST, M.D., JAMES S. FORRESTER, M.D.,
and FRANK LITVAK, M.D.,

Petitioners,

vs.

SECRETARY OF THE
UNITED STATES DEPARTMENT OF ENERGY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY BRIEF

Of Counsel:
BRUCE G. CHAPMAN

LYON & LYON
611 West Sixth Street
Thirty-Fourth Floor
Los Angeles, California 90017

COE A. BLOOMBERG
Counsel of Record

LYON & LYON
611 West Sixth Street
Thirty-Fourth Floor
Los Angeles, California 90017
(213) 489-1600

Attorneys for Petitioners

TABLE OF AUTHORITIES

Page

Cases

Consolidated Rail Corp. v. United States,
896 F.2d 574 (D.C. Cir. 1990) 2

Consolidation Coal Co. v. Federal Mine Safety
& Health Review Comm'n,
824 F.2d 1071 (D.C. Cir. 1987) 2

Eagle-Picher Industries, Inc. v. U.S. EPA,
759 F.2d 905 (D.C. Cir. 1985) 1

No. 93-1450

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

CEDARS-SINAI MEDICAL CENTER, WARREN S. GRUNDFEST, M.D., JAMES S. FORRESTER, M.D., and FRANK LITVAK, M.D.,
Petitioners,

vs.

SECRETARY OF THE UNITED STATES DEPARTMENT OF ENERGY
Respondent.

PETITIONERS' REPLY BRIEF

The Secretary of Energy, in arguing that there is no conflict between the circuits as presented in the Petition, misleadingly characterizes the District of Columbia Circuit's holding in *Eagle-Picher Industries, Inc. v. U.S. EPA*, 759 F.2d 905 (D.C. Cir. 1985). This is evident from the following:

The Opposition states:

> [I]n a *narrow* category of cases, the D.C. Circuit has dispensed with the hardship test. . . . The *Eagle-Picher* exception plainly does not apply here, since there is nothing in 42 U.S.C.

> 5908 suggesting that Congress favored immediate challenges to patent right determinations.

(Opposition, pp. 10-11; emphasis added.)

But the District of Columbia Circuit has said:

> The dissent's attempt to characterize *Eagle-Picher* as a "narrow exception" to an absolute rule requiring special hardship in all cases, applicable only where Congress has explicitly indicated a preference for immediate review . . ., finds no support in *Eagle-Picher* itself or other ripeness decisions of this court or in *Abbott Laboratories*, which places no such limit on the court's power to determine when the balance tips in favor of immediate review.

Consolidation Coal Co. v. Federal Mine Safety & Health Review Comm'n, 824 F.2d 1071, 1082 n.12 (D.C. Cir. 1987).

In other words, the District of Columbia Circuit's exception to application of the hardship prong is not narrow; *Consolidated Rail Corp. v. United States*, 896 F.2d 574 (D.C. Cir. 1990), cited in the Petition, means what it says. And what *Consolidated Rail* says conflicts with the Federal Circuit's application of the hardship test to petitioners. Clearly, the District of Columbia and Federal Circuits are in conflict.

The Secretary's attempt, to depict the District of Columbia Circuit's exception to application of the hardship test as narrow, is a transparent attempt to avoid review. But not only does that exception exist, that exception is growing. And the District of Columbia

Circuit's exception conflicts with the Federal Circuit's refusal to recognize such an exception in similar cases. The Petition should be granted so that this conflict may be resolved.

DATED: June 10, 1994.

Respectfully Submitted,

COE A. BLOOMBERG
Counsel of Record
LYON & LYON

Of Counsel:
BRUCE G. CHAPMAN
LYON & LYON

Attorneys for Petitioners